No. 11,822

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EMANUEL STAVROS HOUVARDAS,
Appellant,

vs.

I. F. WIXON, District Director of Immigration and Naturalization,
Appellee.

BRIEF FOR APPELLEE.

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THE FACTS OF THE CASE.

The appellant is a native of Greece. He claims to have last entered the United States in March or April, 1912 or 1913, at the Port of New York City, New York, as a passenger. The local office of the Immigration and Naturalization Service was unable to verify his claimed entry into the United States. (Exhibit A, Record of Hearing of September 27, 1943—Exhibit 2.) He claims to have lived in the United States continuously since this entry, and appellant is now fifty-four years of age. (R. 2-3.)

Appellant was first convicted of a violation of the laws of the United States in Los Angeles County on

an indictment in two counts alleging forgery of a fictitious name. He was tried and found guilty on both of these counts on February 14, 1939. Execution of sentence was suspended, and he was placed on probation for a period of five years. (R. 3-4.)

Later, on April 14, 1942, he was convicted of a crime of lewd and lascivious conduct and sentenced to the State Prison at San Quentin for the term prescribed by law (0 to 15 years). (R. 4.) On April 29, 1942, the Superior Court in and for the County of Los Angeles made and entered the following order, to-wit:

> "Probation having been heretofore revoked, the sentences imposed on February 14, 1939, committing this defendant to the California State Prison at San Quentin for the term prescribed by law as to each of Counts 1 and 2, concurrently, are placed into full force and effect. These sentences are ordered to run concurrently with State Prison sentence pronounced in Fresno County, which defendant is now serving." (R. 5.)

On March 22, 1944 the California State Board of Prison Terms and Paroles made and entered an order fixing appellant's term of imprisonment at confinement in the State Prison for ten years and ten years. C.C. (R. 6-7.)

Appellant was confined in the State Prison at San Quentin until January 23, 1945, when he was released on parole. Such parole expired on January 23, 1948. (R. 7.)

On or about September 12, 1946, appellant, through his then attorney, sought to apply for a pardon for his crimes to the Honorable Earl Warren, Governor of the State of California, who refused to entertain the application. (R. 5-6.) Appellant admits that he has never secured a pardon from the executive authority of the State of California. (R. 9.)

SUMMARY OF ISSUES AND LEGAL ARGUMENT.

The fundamental issue in this case is whether the action of the Attorney General of the United States in ordering the deportation of the appellant under 8 U.S.C. 155 is arbitrary and unlawful in that he does not extend to appellant an unlimited period of time in which to apply for a pardon, and to read into Section 155(a) Title 8 U.S.C.A. a provision staying the deportation of an alien until he has made one or more applications to the proper executive authority for a pardon for his offenses.

Section 155(a) Title 8 U.S.C.A. reads as follows:

> "* * * except as hereinafter provided, any alien, who, after May 1, 1917, is sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or *who is sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude committed at any time after entry,* * * * *shall, upon the warrant of the Attorney General,*

be taken into custody and deported * * *." (Italics supplied.)

"The provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who *has been pardoned,* nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having been given to representatives of the State, make a recommendation to the Attorney General that such alien shall not be deported in pursuance of this chapter. * * *" (Italics supplied.)

Congress has specifically legislated on the subject of deportation after release from imprisonment. 8 U.S.C.A. 180(b) provides:

"An alien sentenced to imprisonment shall not be deported under any provision of law until after the termination of the imprisonment. *For the purposes of this section, the imprisonment shall be considered as terminated upon the release of the alien from confinement whether or not he is subject to rearrest or further confinement in respect of the same offense.* (Italics supplied.)

The purpose and object which this section was intended to serve and accomplish are stated in the report (H.R. 2418, 70th Congress, Second Session) of the House Committee on Immigration and Naturalization in reporting on Bill S 5094, which became the Act of March 4, 1929, (now 8 U.S.C.A. 180). With reference to Section 5 of that bill which, with a slight

revision, was enacted as Section 3 of the 1929 Act (now 8 U.S.C.A. 180), the Committee said (p. 8):

> "In the case of prisoners released on parole under convictions by State courts, it was the practice of the department until recently to take the prisoner into custody immediately on his parole if deportable for any reason. Objections were made by one of the States to this practice, on the ground that it was an infringement on the right of the State to retain custody of the prisoner during the period he is out on parole. The Solicitor of the Department of Labor recently advised the Secretary of Labor that the statute did not authorize the practice of the Department, and accordingly it has been discontinued so that under the present law the alien is not deported until the end of the term for which sentenced or until he is unconditionally released from confinement. Your committee is convinced that the law should be made clear that the alien is deportable immediately upon his release from confinement. If he belongs to a deportable class he should be deported even though it may not be against the public policy of the State, under whose laws he has been convicted, that he should be allowed to go at large on parole. The authority of Congress in relation to deportation of aliens is supreme and the law or practice of a State can not and should not allow an alien to remain in this country for a moment longer than permitted by the act of the National Legislature, which alone is charged with the duty and responsibility of ridding the country of undesirable aliens. Accordingly, section 5 of the bill provides that the alien may be deported immediately upon his release on parole."

It has since been judicially well settled that release from confinement on parole is a termination of imprisonment and that a deportable alien thus released from confinement becomes immediately subject to deportation. (Section 3, Act of March 4, 1929 (8 U.S.C. 180(b)); Section 19, Act of Feb. 5, 1917 as amended (8 U.S.C. 155); Act of Jan. 19, 1929 (21 U.S.C. 237); Act of March 2, 1931 (18 U.S.C. 716; *Lu Woy Hung v. Haff,* 78 F. (2d) 836 (C.C.A. 9, 1935), and cases cited therein; 8 C.F.R. 150.12(b)). See also *U. S. ex parte Rupert,* 38 F. Supp. 153 (D. C. Tex., 1941) holding that a parole is not to be considered a pardon, as it is mere liberty under supervision. See *In the Matter of Szie Ben Eng,* 27735-G, March 16, 1948, D. C. N. D. Calif.

In the instant case the alien is deportable for a criminal offense under Section 19(a) of the Immigration Act of February 5, 1917 (8 U.S.C. at 155(a)) on the warrant charge: Sentenced more than once because of conviction of crimes committed after entry, to-wit: Forgery of fictitious name with intent to defraud; Lewd and lascivious conduct. Under the provisions of Section 19(d) of the same act (8 U.S.C. 155(d)) this class of deportable criminal aliens are excluded from discretionary relief provided by Section 19(c) of the same act (8 U.S.C. 155(c)) for voluntary departure or suspension of deportation. This petitioner's deportation is therefore mandatory, and by operation of Section 3 of the Act of March 4, 1929, supra, he became immediately subject to

deportation upon his release from confinement on parole.

But under the provisions of Section 19(a) of the Immigration Act of February 5, 1917 (8 U.S.C. 155(a)) an alien convicted in the United States of a crime involving moral turpitude, as here, is not deportable for that reason if he *has been granted a full pardon.* Since this petitioner has not been granted such pardon, he remains deportable. He nevertheless has heretofore sought, administratively to obtain stays of deportation to permit him to apply for such a pardon in the State of California. On May 16, 1946 he was administratively granted a stay of deportation for a period of thirty days. Thereafter his attorney filed a motion that the case be reopened for the introduction of new evidence. The motion was denied on May 23, 1946, and the order of denial was affirmed by the Board of Immigration Appeals on June 6, 1947. Later, his counsel stated that he had been taking the preliminary steps necessary to the presentation of the alien's application for a pardon and that as the procedure is long and involved, he requested a further stay of ninety days within which to complete and have a determination of the alien's application for pardon. This was administratively denied. He now petitions in habeas corpus.

The scope of judicial review of deportation proceedings in habeas corpus is extremely narrow, since the decision of the Attorney General, or of a board of special inquiry if not appealed, is final and gen-

erally may not be disturbed by the courts in habeas corpus proceedings if supported by some substantial evidence, if it was made after a fair hearing, and no error of law was committed.[1] Even in those cases where

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[1]The deportation of aliens unlawfully in the United States is by statute committed to the Attorney General. Section 19 of the Immigration Act of 1917, as amended (39 Stat. 889-890; 54 Stat. 671-673; 56 Stat. 1044; 8 U. S. C. 155) provides that in deportation cases "The decision of the Attorney General shall be final." The statutes make no provision for judicial review and the finality of such administrative determinations has been repeatedly confirmed by the courts since the earliest immigration cases. *Kishimura Ekin v. United States,* 142 U. S. 631, 660 (1892); *Fong Yue Ting v. United States,* 149 U. S. 698 (1893).

All attempts to secure direct judicial review or intervention in deportation cases have been flatly rejected by the courts, regardless of the basis on which jurisdiction has been alleged. The Courts have held themselves without jurisdiction to entertain a bill in equity to cancel an order of deportation, *Fafalios v. Doak,* 50 F. (2d) 640 (App. D. C. 1931), certiorari denied 264 U. S. 651; a bill in equity for injunction, *Dash v. Turbrick,* 6 F. Supp. 390 (S. D. Mich. 1934), *Bata Shoe Co. v. Perkins,* 33 F. Supp. 508 (D.C. D. C., 1940); a bill in equity for a declaratory judgment, *Darabi v. Northrup,* 54 F. (2d) 70 (C.C.A. 6, 1931); a petition for writ of certiorari, *In re Ban,* 21 F. (2d) 1009 (W.D. N. Y., 1927); a petition for writ of prohibition, *Poliszek v. Doak,* 57 F. (2d) 430 (App. D. C. 1932) *Kabadian v. Doak,* 65 F. (2d) 202 (App. D. C. 1933) certiorari denied 290 U.S. 661; a petition to compel return of evidence allegedly illegally procured, *Impiriale v. Perkins,* 66 F. (2d) 805 (App. D. C. 1933) certiorari denied 290 U.S. 690; a petition for review under Section 10 of the Administrative Procedure Act, *U. S. ex rel., Trinler v. Carusi,* 72 Fed. Supp. 193.

The courts, of course, have passed upon deportation cases in habeas corpus proceedings. Habeas corpus, however, does not provide a direct judicial review, such as is provided by appeal or writ of error. Habeas corpus is not a proceeding in the original suit, but is an independent civil suit. *Middle v. Dyche,* 262 U.S. 333 (1923). It is a collateral review. *U. S. ex rel. Vajtauer v. Commissioner,* 273 U. S. 103 (1927). It stems, not from any right of judicial review, but from the due process clause of the Fifth Amendment to the Federal Constitution. Its purpose is to inquire "into the cause of restraint of liberty" (R.S. 752; 28 U.S.C. 452) and it is not available to one who, though anticipating arrest, is

administrative authorities are authorized by particular provisions of statute to exercise their discretion in deportation proceedings, as in considering applications for voluntary departure or suspension of deportation under Section 19 (c) of the Immigration Act of 1917, the Courts have no proper control over the discretion thus exercised unless the action taken

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not yet in custody. *Wales v. Whitney,* 114 U.S. 564 (1885); *Stallings v. Splain,* 253 U.S. 339 (1920); *Sibray v. United States,* 185 Fed. 401 (C.C.A. 3, 1911); *Ex parte Musci,* 1 F. Supp. 587 (S.D. N. Y. 1922); *Doss v. Lindsley,* 53 F. Supp. 427 (E.D. Ill., 1944). It is not available as a matter of right, and the Court may refuse to issue the writ when it appears from the petition that the party is not entitled thereto. 14 Stat. 385; 28 U.S.C. 455; *Walker v. Johnston,* 312 U.S. 275 (1941).

Moreover, the scope of judicial review on habeas corpus is extremely narrow. The administrative findings of fact are conclusive, if supported by some evidence of probative value, and are not open to attack merely by showing that they are wrong. *U. S. ex rel. Vajtauer v. Commissioner,* supra; *Tisi v. Tod,* 264 U.S. 109, 133 (1924). The courts do review the administrative conclusions of law involving interpretation of the statutory grounds for deportation, *Mahler v. Eby,* 264 U. S. 32 (1924); *Kessler v. Strecker,* 307 U.S. 22 (1939); *Bridges v. Wixon,* 326 U.S. 135 (1945), since the administrative authorities have no power to deport for a ground not listed in the statutes. Similarly, the courts on habeas corpus will determine a petitioner's charge that the administrative hearing was unfair, *Tod v. Waldman,* 266 U.S. 113 (1924), or that he has been in custody for an unreasonable length of time, *Ross v. Wallis,* 279 Fed. 401 (C.C.A. 2, 1922).

The Immigration statutes contemplate that the administrative determinations, when made within the scope of the statutory authority, shall be final. Where the immigration officials have exceeded or abused their authority, the writ of habeas corpus provides "an adequate and complete remedy." *Fafalios v. Doak,* supra. Narrow in scope as it is, therefore, the review by habeas corpus is "the only available procedure to determine whether the immigration authorities have exceeded or abused their power." *Wong Sun v. Fluckey,* 288 Fed. 989, 994 (N.D. Ohio, 1922).

constitutes denial of due process of law.[2] Stays of deportation are acts of administrative discretion, as distinguished from authority to grant discretionary relief such as arises under Section 19 (c), previously referred to. Administrative discretion in granting stays is sometimes exercised in cases arising from transportation difficulties, physical condition of aliens, and various other exceptionable and justifiable circumstances including situations where, in cooperation with other authorities, deportable aliens may be needed as witnesses. Cooperative administrative discretion has also been exercised to grant stays where there is sound reason to believe that pending legislation or applications for pardon or other proceedings are likely to result in action that may remove a legal basis for deportation. However, where the discretion is not exercised in favor of the alien the courts, under the well-defined limits of habeas corpus proceedings previously referred to, have no authority to control the discretion nor to review the deportation proceedings unless on the fundamental issues of whether there is sufficient evidence, whether there has been a fair hearing, and whether any error of law has been committed. Unless such issues are involved, it is be-

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[2]*Kazue Sumi v. Carmichael,* 118 F. (2d) 707 (C.C.A. 9, 1941); *Boraca v. Schlotfeldt,* 109 F. (2d) 106 (C.C.A. 7, 1940); *Stone ex rel. Colonna v. Tillinghast,* 32 F. (2d) 447 (C.C.A. 1, 1929); *Ickowitz v. Day,* 18 F. (2d) 962 (C.C.A. 2, 1927); *Chanin v. Williams,* 177 F. 689 (C.C.A. 2, 1910); *Katnic v. Reimer,* 25 F. Supp. 925 (D.C. N.Y. 1938); *Ex parte Panagopoulos,* 3 F. Supp. 222 (D.C. Calif. 1933); *Kutas v. Williams,* 204 F. 847 (D.C. N. Y., 1913); *Bjorkens v. Watkins,* U. S. District Court, Southern District of New York, March 28, 1945, unreported, Civil 30-84.

lieved the decision of the administrative authorities is final and beyond the power of the Court to disturb. (Footnotes 1 and 2, supra.)

No doubt because of the well-defined limits of habeas corpus proceedings, relatively few petitions have been filed since enactment of Section 3, Act of March 4, 1929, where the sole or predominant relief sought was a stay of deportation by an alien on parole until he could apply for a pardon. No such cases limited exclusively to this issue have been identified as arising since the end of the war, with the resumption of active deportations and consequent habeas corpus actions. Even the older cases, extending back to 1930, reflect generally that petitioners did not rely upon the Courts to grant such relief. Situations did arise where aliens ordered deported raised issues as to whether their release from confinement was on parole or probation, or whether either operated as a conditional pardon, etc. But in the absence of such issues, petitioners usually sought review and release on the substantial issues within the limits of habeas corpus, and apparently did not press any contention that the Courts had authority to stay their deportations where the parole had not expired.

Appellant contends that in issuing the instant warrant for his deportation, the Attorney General of the United States acted in excess of his powers and of the jurisdiction conferred upon him by the statutes of the United States.

Appellant contends that the words "has been pardoned" should read "who may be pardoned in

the future." Such a construction would do violence to the phraseology actually used in this section of the law. The construction contended for by the appellant would actually prevent the deportation of all aliens under Section 155 (a) Title 8 U.S.C.A., because it would be impossible in any case for the Attorney General to determine whether or not an alien held for deportation under the provisions of this section might at some indefinite time in the future receive the favorable consideration of the executive authority authorized to pardon his offenses, such action, of course, being entirely conjectural.

The appellant further contends that unless his petition is granted under the Fourteenth Amendment to the Constitution of the United States, he would be denied his liberty without due process of law and the equal protection of the law. If, as held by the appellee, he is held in custody under a valid warrant of the Attorney General for his deportation, it would seem to necessarily follow that he is being held in lawful custody.

It is submitted that the words "has been pardoned" refer to the condition of the alien at the time of his being taken into custody for deportation under a lawful warrant.

It might be well to state that an alien residing in this country is subject at all times to the power of Congress to legislate on all matters which might prohibit or limit his stay in this country.

U. S. ex rel. Feuer v. Day, Commissioner of Immigration, C.C.A. 2nd, decided May 5, 1930, 42 Fed. (2d) 127.

CONCLUSION.

1. The construction of Section 155 (a) Title 8 U.S.C.A., sought by appellant to read into this section the words "may be pardoned in the future" would lead to absurd results.

2. There is no denial of the right of due process of law on the part of the Attorney General of the United States when he sees fit in the exercise of his discretion to deny an application for administrative relief.

3. That by reason of the indulgence of the Attorney General in granting to the appellant certain stays of deportation, that official has in no wise admitted that as a matter of right the appellant was entitled to such consideration.

Appellee is, therefore, of the belief that the judgment of the District Court of the United States for the Southern Division of the Northern District of California denying appellant's petition for a writ of habeas corpus was proper and that the decision of the Court below should be affirmed.

Dated, San Francisco, California,
May 3, 1948.

Respectfully submitted,

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